

Poland: Rule-of-Law Developments April – June 2021



eucrim

European Law Forum: Prevention • Investigation • Prosecution

Thomas Wahl

News

This news item continues the updates in previous eucri issues on the rule-of-law situation in Poland as far as it relates to European law (→ *inter alia*, eucri 1/2021, 4 and eucri 4/2020, 257):

- 6 May 2021: In the infringement proceedings in [Case C-791/19](#) concerning the new disciplinary regime for judges within the Polish Supreme Court, [Advocate General \(AG\) Tanchev recommends](#) that the Polish legislation does not comply with Union law. The AG shares the points raised by the European Commission that the disciplinary regime casts severe doubts about judicial independence. The possibility of being sanctioned in disciplinary proceedings on account of the contents of decisions exerts particular pressure on Polish judges and impairs their ability to make substantive decisions and to submit questions for preliminary rulings to the CJEU. In addition, the doubts about the independence and impartiality of the Disciplinary Chamber were justified because of the questionable political influence by the National Council of the Judiciary and the Minister for Justice. The provisions of the Disciplinary Code on the competences and the composition of the disciplinary tribunal are thus incompatible with the guarantee under Art. 19 para. 1 subpara. 2 TEU on effective legal protection of rights. Already in April 2020, the Grand Chamber of the CJEU ordered interim measures in this case, according to which the activities of the Disciplinary Chamber of the Supreme Court were to be suspended for the time being due to the questionable provisions of the Polish judicial reform (→ [eucri 1/2020, 4](#)).
- 7 May 2021: For the first time, the European Court of Human Rights (ECtHR), delivers a judgment on the contentious judicial reform in Poland. In the case of [Xero Flor w Polsce sp. z o.o. v. Poland \(application no. 4907/18\)](#), the ECtHR finds that the election of judges to the Polish Constitutional Court in 2015 was irregular and thus infringed the applicant's right to a "tribunal established by law" in accordance with Art. 6(1) ECHR. The judges in Strasbourg criticized that a judge sat at the bench of the Constitutional Court although his seat had been already legally filled by the old *Sejm* (the Polish parliament). They point out that, after the elections in 2015, the authorities neglected relevant Constitutional Court judgments with a view of usurping the Constitutional Court's role as the ultimate interpreter of the Polish Constitution and the constitutionality of law. The case concerned a complaint from a Polish company that sought compensation from the State for one of its products before the Polish courts.
- 10 May 2021: In a [press release](#), the ECtHR announces that it would examine in detail five more cases related to the controversial Polish judicial reform (for other cases pending before the ECtHR, → [eucri 2/2020, 68](#)). The cases concern the suspension of applicants as judges or public prosecutors from their official duties as well as a complaint against the contentious nomination of judges by the

AUTHOR

Thomas Wahl

Senior Researcher

Max Planck Institute for the
Study of Crime, Security and
Law

Published in
2021, Vol. 16(2) eucri pp 71 –
72

ISSN: 1862-6947

<https://eucri.eu>



National Council of the Judiciary. The ECtHR requested from the Polish government to submit its observations on the cases. In addition, the ECtHR announced that all current and future applications concerning complaints about various aspects of the reform of the judicial system in Poland will be given priority (so-called Category I cases). In accordance with the Court's [prioritisation policy](#), this level of priority is assigned to urgent cases.

- 20 May 2021: [Advocate General Bobek considers](#) the amended Polish practice, according to which the Minister for Justice (who is simultaneously the General Prosecutor) has unfettered discretion to second judges to higher courts, is in clear breach of Art. 19 para. 1, subpara. 2 TEU, read in conjunction with Art. 2 TEU. The national measures at issue appear highly problematic in view of both external and internal aspects of judicial independence. According to the AG, it is worrisome if the criteria for secondment of judges are not made public, the seconded judges seem not subject to ordinary rules, and their secondment is for an indeterminate period of time and can be terminated at any moment at the discretion of the Minister of Justice. In addition, impartiality and judicial independence are at risk if the Minister for Justice/General Prosecutor, i.e. wearing a "double hat", is the body that designates judges and if designated judges may hold the position of "disciplinary agents", as it is the case pursuant to the Polish provisions. The AG's opinion was triggered by a reference for preliminary ruling from a single judge at the Regional Court of Warsaw ([Joined Cases C-748/19 to 754/19](#)). The judge casted doubts that the composition of the panel of judges in criminal proceedings before the Regional Court still observes the presumption of innocence and the separation of powers due to the possible influence on both the public prosecutor's office and the judge to the disadvantage of the accused.
- 20 May 2021: It [becomes known](#) that the Polish Prime Minister *Mateusz Morawiecki* submitted an over 100-page long application to the Polish Constitutional Court which should determine whether certain provisions of the TEU concerning the primacy of EU law and effective judicial protection are consistent with the Constitution of the Republic of Poland. An [unofficial English translation](#) is provided for at the portal <https://ruleoflaw.pl>.
- 15 June 2021: The [Polish Constitutional Court blatantly rejects](#) a request filed by the Polish Ombudsman to remove judges from the court's bench as reaction to the ECtHR's judgment of 7 May 2021 in [Xero Flor w Polsce sp. z o.o. v. Poland](#) (see above). According to an [English translation](#) of the decision at the website <https://ruleoflaw.pl>, the Polish Constitutional Court considers the ECtHR's judgment "a non-existent judgment (*sententia non existens*)." The Polish judges believe that "the ECtHR judgment of 7 May 2021 ... is based on arguments testifying to the Court's ignorance of the Polish legal system, including the fundamental constitutional assumptions specifying the position, system and role of the Polish constitutional court. To this extent, it was issued without legal grounds, overstepping the ECtHR's jurisdiction, and constitutes unlawful interference in the domestic legal order, in particular in issues which are outside the ECtHR's jurisdiction."
- 17 June 2021: [According to Advocate General \(AG\) Bobek](#), a national court is entitled to disregard national legal provisions on the attribution of jurisdiction or rulings of a higher court if it considers them incompatible with EU law, in particular with the principle of judicial independence. The AG's opinion concerns a legal battle between the Polish bar association and the Polish General Prosecutor/Minister of Justice, in which the former has refused to initiate disciplinary proceedings against a lawyer. The referring Disciplinary Court of the Bar Association in Warsaw wondered which procedural consequences are triggered by the CJEU's judgment of 19 November 2019 that confirmed that the Disciplinary Chamber of the Supreme Court lacks judicial independence (→ [eucrim 3/2019, 155-156](#)). The Disciplinary Chamber will, upon possible appeal, finally adjudicate on the disciplinary sanctions of the lawyer. AG *Bobek* backs the opinion that the EU Service Directive (2006/123/EC) is applicable in the proceedings at issue and may secure unlawful withdrawal of lawyers' authorizations. Lastly, the AG notes that references for preliminary rulings may not be the appropriate way to tackle pathological

situations in an EU Member State. He believes that infringement actions remain a more appropriate remedy to settle institutional stand-offs in a context where one or more actors refuse to follow the CJEU's judgments. The case is referred to as *C-55/20 (Ministerstwo Sprawiedliwości)*.

About eucrim

eucrim is the leading journal which regularly informs about current developments in European criminal and "criministrative" law.

All news items are freely accessible at: <https://eucrim.eu/news/>

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases of issues.

The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).



**Co-funded by
the European Union**